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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA

v.

HOWARD E. HATCH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the information has not been reported. A copy of the order is annexed hereto as an Appendix, *infra*, p. 5.

JURISDICTION

The order of the district court dismissing the information was entered November 16, 1956. Notice of appeal to this Court was filed December 10, 1956. The jurisdiction of this Court to review on direct appeal an order dismissing an information, based on a construction of the statute on which the information is founded, is conferred by 18 U.S.C. 3731. *United States* v.

Borden Co., 308 U.S. 188; *United States* v. *Ludenia Howard*, No. 52, this Term.

STATUTE INVOLVED

The Internal Revenue Code of 1954, 26 U.S.C., Supp. III, provides in pertinent part:

> Sec. 4461. Imposition of tax.
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462(a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *
>
> Sec. 4462. Definition of coin-operated amusement or gaming device.
>
> (a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—
>
> (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and
>
> (2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens,

(b) *Exclusion.*—The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

QUESTION PRESENTED

Whether a pinball machine, the operation of which involves the application of the element of chance as the result of which the player becomes entitled to free plays or money, is the type of gaming device which is subject to the tax imposed by 26 U.S.C. (Supp. III) 4461(2) upon "so-called 'slot' machines" as defined in 26 U.S.C. (Supp. III) 4462(a)(2).

STATEMENT

The information in this case charged that defendant permitted upon his premises the use of a coin-operated gaming device upon which he was required to pay the tax imposed by 26 U.S.C. 4461(2) (*i.e.*, the tax upon a "so-called 'slot' machine" as defined in 4462(a)(2) involving application of chance as the result of which the player may be entitled to a premium or cash) and that he wilfully refused to pay such tax. A bill of particulars specified that the machine is a coin-operated pinball machine as to which certain scores give the player his option of free plays or cash. The operation

of the machine is described in an affidavit filed in the cause which shows that odds for certain benefits are determined by electrical devices, and not by the player.

The district court, on defendant's motion, dismissed the information for failure to state an offense. It adopted the reasoning of the Court of Appeals for the Seventh Circuit in *United States* v. *Korpan*, 237 F. 2d 676, pending on writ of certiorari granted January 21, 1957, No. 596, this Term, to the effect that no pinball machine is within the definition of a "so-called 'slot' machine" in 26 U.S.C. 4462(a)(2) even though the machine is operated by a coin, and by the application of the element of chance entitles the player to cash or premiums.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is the same as that presented in the petition for a writ of certiorari in *United States* v. *Korpan*, No. 596, this Term, and on direct appeal from the decision of the District Court for Minnesota in *United States* v. *Hunt* and *United States* v. *Ollhoff*, Nos. 674 and 675, this Term. For the reasons stated in the petition for a writ of certiorari in *Korpan* and the jurisdictional statement in the *Hunt* and *Ollhoff* cases, the question is one which should be resolved by this Court.

Respectfully submitted,

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JANUARY 1957.

APPENDIX

Order Granting Motion of Defendant to Dismiss Minute Entry, Wright, J.

November 16, 1956

(Number and Title Omitted)

This cause came on at a former day, to be heard on the motion of the defendant to dismiss the information filed herein and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, on due consideration thereof;

It Is Ordered by the Court that the motion of defendant to dismiss the information, be, and the same is hereby, Granted on authority of United States v. Korpan, 7 Cir., 237 F. 2d ——, decided Sept. 28, 1956.

(Initialed) J.S.W.

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